

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17509-B of Application of Bernard L. Renard, Motion for a Two-Year Extension of BZA Order No. 17509, pursuant to 11 DCMR § 3130. The original application was pursuant to 11 DCMR § 3104.1, for a special exception to allow an addition to one of two row dwellings sharing the same lot proposed for subdivision under § 223, not meeting the minimum width requirements for an open court (§ 406.1) or the maximum percentage of lot occupancy limitations (§ 403) and under § 3103.2, for a variance from the minimum lot width requirements under § 401 in the R-4 District at premises 521-523 11th Street, S.E. (Square 973, Lot 67) (site per sub).¹

HEARING DATES (Orig. Application): September 19, 2006, January 30, 2007, and May 22, 2007
DECISION DATE (Orig. Application): May 22, 2007
FINAL DATE OF ORDER (Order No. 17509): June 11, 2007
DECISION ON 2009 MOTION TO EXTEND ORDER: March 24, 2009
DATE OF ORDER ON 2009 MOTION (Order No. 17509-A): April 8, 2009
DECISION ON 2011 MOTION TO EXTEND ORDER: July 12, 2011

SUMMARY ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17509

The Underlying BZA Order

On May 22, 2007, the Board of Zoning Adjustment (“Board” or “BZA”) approved the Applicant’s request for a special exception to allow an addition to one of two row dwellings sharing the same lot proposed for subdivision under § 223 of the Zoning Regulations, not meeting the minimum width requirements for an open court (§ 406.1) or the maximum percentage of lot occupancy limitations (§ 403) and under § 3103.2, for a variance from the minimum lot width requirements under § 401 in the R-4 District at premises 521-523 11th Street, S.E. (Square 973, Lot 67) (site per sub). On June 11, 2007, the Office of Zoning (“OZ”) filed in

¹ The original application was amended to include a request for a special exception under § 223 as well as a request for area variance relief. (See, Order No. 17509.) Although this request for extension was described as being to Order No. 17509-A, in fact the request was to extend the underlying order, Order No. 17509, and the relief granted in that order.

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the record and served upon the parties an order approving Application No. 17509. Pursuant to 11 DCMR §§ 3125.5 and 3125.9, the order became “final” on that date and took effect 10 days later. (Exhibit 43.)

Extension of the BZA Order Pursuant to a Waiver Under § 3100.5

Subsection 3130.1 of the Board’s Rules of Practice and Procedure provides in part that:

No order of the Board authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years ... unless, within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit.

(11 DCMR § 3130.1.)

Although the provision does not specify whether the two-year period begins on the date the order became final or when it took effect, the Board has traditionally used the former as the start date. Therefore, Order No. 17509 would have expired on June 11, 2009 unless building permits were applied for on or before that date.

On or about March 13, 2009, the Applicant filed a letter with the Board requesting an extension of the validity of Order No. 17509.

Because the Zoning Regulations did not, at that time, contain a provision expressly authorizing the BZA to extend the validity of an order past the two-year limit set forth in § 3130.1, the Applicant requested the Board to waive that provision. Concerning the request to extend the order, the Board granted the waiver requested pursuant to 11 DCMR § 3100.5. This provision authorizes the Board to waive many of its rules, including § 3130.1, upon a showing of good cause shown, if the waiver would not prejudice the rights of any party, and the waiver was not otherwise prohibited by law. In this case, the Board found that the criteria under § 3100.5 had been satisfied and, through the issuance of Order No. 17509-A, the Board extended the validity of the underlying order for a period not to exceed two years, thus making the new expiration date for Order No. 17509 June 11, 2011.

Motion to Extend Validity of Order Pursuant to 11 DCMR § 3130.6

On or about May 9, 2011, the Board received a letter from the Applicant, which requested, pursuant to 11 DCMR § 3130.6, a two-year extension in the authority granted in Order No. 17509. The Applicant is requesting a two-year extension in the authority granted in that order because, due to the deterioration of the real estate market in Washington, D.C., the frozen credit markets, and the continuing economic crisis these have caused, together with recently enacted regulations applicable to Fannie Mae and similar agencies, all of which obstacles are outside of the Applicant’s control, the Applicant has been unable to obtain all of the necessary financing

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commitments to begin the project, despite attempts to do so since the Board originally approved it. (Exhibits 49, 51, and 52.)

Procedural Issues

After the issuance of Order No. 17509-A granting the waiver, but prior to the filing of the new request, the Zoning Commission (“Commission”) adopted amendments to § 3130 to specifically authorize the Board to extend the time limits of § 3130.1. *Z.C. Order No. 09-01*, 56 DCR 4388 (June 5, 2009). Among other things, the new provisions allowed for only one extension of an order (§ 3130.6). The rules also addressed the question of whether an order would remain valid if the Board was unable to decide a request prior to its expiration date. The rules provide that an order’s expiration would be tolled if an extension request was filed at least 30 days prior to the expiration date (§ 3130.9).

As to the criteria for granting a request, new § 3130.6 (c) requires the demonstration of good cause through substantial evidence of one or more of the following criteria:

- (1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant’s reasonable control;
- (2) An inability to secure all required governmental agency approvals by the expiration date of the Board’s order because of delays that are beyond the applicant’s reasonable control; or
- (3) The existence of pending litigation or such other condition, circumstance or factor beyond the applicant’s reasonable control.

The first question for the Board was whether the Applicant was barred from making his request due to the language in § 3130.6 which expressly allows the Board to grant only one extension.² The Board finds that the prior extension is not counted towards this limit. As explained above, the new regulation was not in effect as of the final date of the order granting the 2009 request for an extension. Section 6(A) of the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-502 (6)(A), defines a rule to mean the “whole or any part of any Mayor’s or agency’s statement of general or particular applicability *and future effect*” (emphasis added). Therefore, the limit of one extension stated in the new rule was prospective only, so that the prior extension does not count towards this limit.

The Merits of the Request to Extend the Validity of the Order Pursuant to § 3130.6

The Board finds that the motion has met the criteria in § 3130.6 to extend the validity of the underlying order. To meet the burden of proof under 11 DCMR § 3130.6, the Applicant submitted a letter dated May 9, 2011, that described his efforts and difficulties in obtaining financing, together with another letter dated March 29, 2011, from CitiMortgage to the Applicant

² This limitation also may be waived pursuant to § 3100.5.

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containing a response to his request to have a portion of the property released from the existing mortgage, and a copy of an Application for Release of Security, dated April 27, 2011. The Applicant indicated in the May 9th letter that his project has not substantially changed, but has been temporarily stalled due to his inability to secure sufficient project financing resulting from the current economic and financial market conditions beyond his control. He noted that he has sought financing for several years from numerous banks and other financial institutions, but has been unable to refinance the existing mortgage. The Applicant stated that he has applied for financing over the last two years, but the applications have been denied, for the reason that they fall under the new, more restrictive rules that govern since the financial crisis. He explained how under Fannie Mae's new regulations, were he to pay off the mortgage now secured by both properties prior to subdivision so as to secure a new mortgage on only one property, or on each of the two subdivided properties, it would be deemed a "cash out" transaction that currently is not allowed. The Applicant added that under current financial market conditions, most banks are only providing mortgages for investment properties that can be sold to Fannie Mae or other like agencies, i.e., the Fannie Mae "1-4" investment properties program, and that few banks are even participating in the Fannie Mae "5-10" investment properties program. Since the Applicant owns more than four properties, he does not qualify for the Fannie Mae program in which most banks participate. He has applied for refinancing at his current mortgage holder, and his application is pending and expected to take several months for processing. An extension of the underlying order is needed to allow the project to be completed, given the delay the Applicant has encountered in obtaining financing. (Exhibits 49 and 51.) The Applicant also noted that despite being unable to secure the necessary financing, he has continued to prepare building permit drawings and apply for building permits. (Exhibits 49, 51, and 52.)

The Office of Planning ("OP"), by memorandum dated July 5, 2011, reviewed the application for the extension of the orders for "good cause" pursuant to § 3130.6 and did not voice any objections to the motion. (Exhibit 53.) The project is within the boundaries of Advisory Neighborhood Commission ("ANC") 6B. The Applicant served the ANC with the motion to extend. No reply to the application for extension was submitted by the ANC.

The Board found that the Applicant has met the criteria set forth in § 3130.6. The reasons given by the Applicant were beyond the Applicant's reasonable control within the meaning of § 3130.6(c)(3) and constitute the "good cause" required under § 3130.6(c)(1). In addition, as required by § 3130.6(b), the Applicant has demonstrated that there is no substantial change in any of the material facts upon which the Board based its original approval in Order No. 17509. The motion for a time extension was served on all the parties to the application and those parties were given 30 days in which to respond under § 3130.6(a).

As required by § 3130.6(b), there is no substantial change in any of the material facts upon which the Board based its original approval. In requesting this extension, the Applicant's plans for development of the site would be substantially unchanged³ from those approved by the Board

³ OP noted in its report that there is a minor change to the development plan being proposed to reduce the building height of the proposed addition by two feet. (Exhibit 53.)

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in Order No. 17509 (Exhibit No. 38 in the record). There have been no changes to the Zone District classification applicable to the property or to the Comprehensive Plan affecting this site since the issuance of the Board's Order.

Neither the ANC nor any party to the application objected to an extension of the Order. The Board concludes that the extension of that relief is appropriate under the current circumstances.

Pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case No. 17509 for a two-year time extension of Order No. 17509, which Order shall be valid until June 11, 2013, within which time the Applicant must file plans for the proposed structures with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: 4-0-1 (Meridith H. Moldenhauer, Nicole C. Sorg, Lloyd J. Jordan, and Jeffrey L. Hinkle to Approve; No Zoning Commission member participating or voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 19 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on _____, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, or delivered by electronic mail in the case of those ANC's and SMD's that have opted to receive notices thusly, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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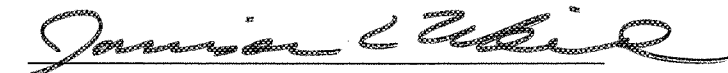
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